United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2161

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

FELIX CASTRO, :

Petitioner-Appellant, : Docket No. 76-2161

-against- :

EUGENE LeFEVRE, Superintendent, :

Respondent-Appellee. :

----------X

B

P/S

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Office & P.O. Address
Two World Trade Center
New York, N.Y. 10047
Tel. (212) 488-3390

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOAN P. SCANNELL
Assistant Attorney General
of Counsel

TABLE OF CASES

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FELIX CASTRO, Petitioner-Appellant,	:	Docket No. 76-2161
-against-	:	
EUGENE LeFEVRE, Superintendent, Respondent-Appellee.	:	

BRIEF FOR RESPONDENT-APPELLEE

Petitioner-appellant appeals from a decision of the United States District Court for the Southern District of New York (Brieant, J.) dated September 30, 1976 denying petitioner-appellant's application for a federal writ of habeas corpus.

Questions Presented

1. Whether the District Court properly ruled that petitioner-appellant was not deprived of a federally protected right?

2. Whether issues which were never presented by petitioner-appellant in either the District Court or the State Courts are properly raised in this Court?

Preliminary Statement

Petitioner-appellant ("petitioner") was convicted on March 14, 1974 after a plea of guilt in the Supreme Court, Bronx County (Dollinger, J.) of the crime of Robbery in the First Degree, a class B felony. The plea covered two indictments the first charging the crime of Robbery in the First Degree and Possession of a Weapon and the second charging Robbery in the Second Degree and Possession of a Weapon as a misdemeanor. Petitioner was sentenced to a minimum of seven and one half and a maximum of fifteen years imprisonment. The conviction was affirmed by the Appellate Division, First Department and petitioner was denied leave to appeal to the New York Court of Appeals. Petitioner then sought federal habeas relief resulting in this appeal.

Statement of Facts

A. The Crime

On September 21, 1973 petitioner and his accomplice robbed at knife point an attendant at a Bronx service station. Petitioner took fifty dollars and an adding machine. They then ordered the victim to get under a car and petitioner fled. Petitioner and his accomplice were immediately captured.

B. Plea

Petitioner was indicted for the crime of Robbery in the First Degree and Possession of a Weapon. Petitioner received a hearing on his motion to suppress. After the denial of the motion to suppress, petitioner entered a plea of guilt to the crime of Robbery in the First Degree in satisfaction of all counts in the two indictments. At the taking of the plea the petitioner's attorney informed the court that petitioner wished to plead guilty to Robbery in the First Degree, a B felony, provided the District Attorney had no objection to the Judge treating the case as a C felony (Appellee's Appendix p. 14). The court then explained that the case would be treated as a C felony for the purpose of sentencing; that is there would be a maximum of fifteen years. The court inquired of petitioner whether any additional promise had been made. Petitioner replied that there had not (Appellee's Appendix p. 16).

C. The Sentence

At sentencing the Assistant District Attorney once again reiterated that although petitioner was pleading to a Class B felony the people had no objection to the case being treated as a Class C felony for sentencing (Petitioner's

Appendix p. 2).

The Assistant District Attorney then stated that he had filed the papers for a predicate felony offender and stated that he had served petitioner's attorney's office. Petitioner's attorney stated that he had not been served with the papers. However, the Assistant District Attorney presented his affidavit of service (Petitioner's Appendix p. 3). The papers were then shown to the attorney and the Judge read in open court the statement contained therein, that is, that on May 15, 1967 petitioner pled guilty to attempted Manslaughter in the Second Degree to cover Indictment No. 609 of 1967. This plea was taken in Bronx County and on June 20, 1967 petitioner was sentenced to five years. The petitioner was asked whether he admitted the charges and was given an opportunity to confer with his counsel. Moreover, counsel later indicated that he had also represented petitioner at the predicate felony, that is the attempted manslaughter plea in 1967 (Petitioner's Appendix p. 5). After conferring with his attorney petitioner admitted the predicate felony and when asked declined to say anything before he was sentenced (Petitioner's Appendix 3-4). Petitioner was sentenced to a minimum of seven and one half and a maximum of fifteen years imprisonment (Petitioner's Appendix p. 8).

D. Prior Proceedings

After his conviction was affirmed by the Appellate Division, First Department and leave to appeal to the New York Court of Appeals was denied, petitioner instituted the instant writ of habeas corpus in the United States District Court for the Southern District. In his application petitioner claimed that he was deprived of due process of law because prior to sentencing the Court allegedly failed to advise petitioner he had a right to controvert the allegations of a predicate felony and that he had a right to a hearing on the matter. (Appellee's Appendix p. 7). Petitioner concluded that "since the court did not inform petitioner of the consequences of such an admission and petitioner never personally admitted the prior felony, there is no basis for believing that petitioner appreciated the implications of waiving the procedural rights afforded him under the statute" and was therefore "sentenced as a second felony offender without due process of law" (Petition p. 4). The Court below (Brieant, J.) denied the petition stating that there was no violation of any federally protected right. The Court noted that petitioner was read the second felony offender information in Court, had ample opportunity to confer with counsel and admitted the prior felony. Further the Court noted, that petitioner remained mute at sentencing and

never objected. In addition the sentence fully complied with the bargain where the charges against petitioner were reduced and a guilty plea entered.

POINT I

THE DISTRICT COURT'S FINDING THAT PETITIONER WAS NOT DEPRIVED OF A FEDERALLY PROTECTED RIGHT WAS CLEARLY PROPER. MOREOVER THE STATE COURT IN THE INSTANT CASE, COMPLIED WITH NEW YORK CRIMINAL PROCEDURE § 400.21.

The District Court's finding that petitioner was not deprived of a federally protected right is clearly correct and abundantly supported by the record. It should be noted at the outset that at no time does petitioner attack the legality of his plea or claim that the District Attorney or the Court did not comply with its promise. In fact, petitioner in his application freely admits that he took the plea, admitted the crime, and was sentenced as promised that is, as a C felon. At no time does petitioner claim that he did not commit the crime which he pled guilty to or that his plea was involuntary. The record in the instant case demonstrates that petitioner's plea and sentence were in full compliance with the law. Petitioner was charged with and pled guilty to Robbery in the First Degree a B felony carrying a maximum sentence of twenty five years (See New York Penal Law § 70.00). The plea covered two indictments both of which involved robbery and possession of a weapon. The Court informed petitioner that the District Attorney had no objection

to petitioner's crime being treated as a class C felony rather than a B felony for the purposes of sentencing and thus carrying a lower maximum of fifteen years imprisonment instead of twenty five years. Moreover, when petitioner was asked whether any other promise or recommendation had been made by the District Attorney, petitioner replied in the negative. Petitioner was sentenced as a C felon and the Court complied with their earlier assurance. Petitioner now claims that although he was sentenced as a C felon within the statutory limits the fact that he was sentenced as a predicate felon violated his constitutional rights. Petitioner is in essence claiming that although his plea was valid and he was sentenced as promised, his minimum sentence was too high. This claim is spurious and even if true would not rise to the level of a due process violation. The law is clear that Federal Courts do not sit to review state sentences. As the Court recently stated in Fielding v. LeFevre, ____ U.S. ____:

> "The Eighth Amendment is not a general grant to the federal courts of power to review sentences. Rather, it allows the review of the punishment specified by statute. Thus, we can review a claim that imprisonment for sodomy is cruel and unusual, or that imprisonment of pedophiles violates the amendment, but not that a particular petitioner is deserving of mercy. Put another way, we are to review legislative choices, not abuses of judicial discretion. Gore v. United States, 357 U.S. 386, 393 (1958)."

Moreover, petitioner's claim in effect alleges non-compliance with State law specifically Criminal Procedure Law § 400.21. Petitioner alleges that the Judges in Court reading of the predicate felony information and asking petitioner if he admitted the allegation after an opportunity to confer with counsel, did not comply with the wording of Criminal Procedure Caw § 400.21(3) which states that a defendant must be asked whether he controverts the allegations. This claim involves an interpretation of State law which has consistently been held not reviewable on federal habeas corpus. (Buchalter v. New York, 319 U.S. 427 (1943).

In any event, the Court and the District Attorney fully complied with the Statute. The District Attorney presented proof of service that prior to sentencing he served petitioner's attorney with the second felony offender information. Although petitioner's attorney did not receive the papers, it would seem incredible that he did not have notice of the predicate felony since he represented petitioner on that felony. Moreover, the allegations were shown to petitioner's attorney and read to petitioner in open court. Petitioner was asked whether admitted the allegations and was given time to

confer with his attorney. Petitioner by his attorney freely admitted the prior felony. At no time during sentencing was any objection made. Petitioner had notice and knowingly admitted the allegations thereby waiving a hearing.

Moreover, the state courts have found substantial compliance with § 400.21(3) and a valid waiver in a case exactly analogous to the case at bar. In the case of People v. Bryant, 47 A D 2d 51 (App. Div. 2d Dept. 1975) the defendant was advised of the prior felony in open court and only asked if he admitted the previous felony conviction. The defendant's attorney after conferring with the defendant responded in the affirmative. The Court found that there had been substantial compliance with the statute and that the defendant had waived his rights. See also People v. Presley, 49 A D 2d 804 (App. Div. 4th Dept. 1975); New York ex rel. Ryan v. Smith, 50 A D 2d 1078 (App. Div. 4th Dept. 1975).

Finally, it is most important to note that despite petitioner's claims that he was deprived of due process of law he at no time either in his original pro se petition or in counsel's brief on appeal has alleged even remotely that he would have controverted the allegation of the predicate felony or, more importantly, had the slightest basis upon which to

controvert the allegations. Thus petitioner has wholly failed, even assuming arguendo there was a violation of the statute, to show any prejudice whatsoever.

This absence of prejudice is further substantiated by the fact that it would have been futile for petitioner to deny his prior conviction since the conviction occurred in the same county, it was based on a plea of guilt and petitioner was represented by the same attorney.

POINT II

ISSUES WHICH WERE NEVER PRESENTED BY PETITIONER IN EITHER THE DISTRICT COURT OR THE STATE COURTS ARE NOT PROPERLY RAISED IN THIS COURT.

Petitioner for the first time now claims that the record demonstrates that he was not given prior notice of the predicate felony information and was not advised of his right to contravene the allegations therein. Petitioner justified this new claim on the liberal interpretation rule of a pro se petition, Darr v. Burford, 339 U.S. 200, 204 (1950). It is clear from petitioner's application that at no time did petitioner remotely claim that his attorney did not advise him of his rights at sentencing.

Moreover, petitioner did not raise this claim on his state appeal and thus has failed to exhaust his available state remedies on this issue. The law in this Circuit is abundantly clear on the raising of new issues which have never before been presented to the District or State Courts. United States ex rel. Springle v. Follette, 435 F. 2d 1380 (2d Cir. 1970) cert. denied 401 U.S. 980 (1971). As the Court stated at 1384:

> "Since this point was not raised in the petition for the writ of habeas corpus, it is not properly before us. Even if it has been raised in the petition, we would decline to consider the contention on grounds of lack of exhaustion of state remedies, the contention not having been adequately raised in the appeal in the state courts."

Thus, if petitioner now claims that his attorney failed to adequately advise him at sentencing he must first seek relief in the state courts so that the state may have "a full and fair opportunity to correct its own errors of federal constitutional dimension" United States ex rel. Santiago v. Follette, 298 F. Supp. 973, 975 (D.C.N.Y. 1969); See also Picard v. Connor, 404 U.S. 270 (1970).

Finally, the record demonstrates that petitioner's allegation that he did not receive adequate notice of the predicate felony information is spurious. The Assistant District Attorney stated that he had served petitioner's attorney. When the attorney stated he did not receive the papers the Assistant showed the attorney his proof of service. The attorney then said "allright." (Appellant's Appendix P. 2-3).

Moreover, petitioner and his attorney saw the information and had adequate time to confer. It seems incredible that petitioner and his attorney could not be aware of the predicate felony since it was on a plea of guilt and the attorney had also represented petitioner in that case.

Thus, it is clear that petitioner received adequate notice and was sentenced in accordance with law.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
April 15, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOAN P. SCANNELL
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOAN P. SCANNELL being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for respondents herein. On the 15 day of April, 1977, She served the annexed upon the following named person :

Phyllis Skloot Bamberger Esq
509 U S Courthouse
Foley Sq
N Y N Y 10007

Attorney in the within entitled by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by for that purpose.

Sworn to before me this
day of , 197

Assistant Attorney General
of the State of New York